

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM CHARLESTON COUNTY  
Circuit Court Judge J.C. Nicholson, Jr.

OCT 31 2016

SC Court of Appeals

JAMES ABBOTT..... Appellant

Vs.

MICHELE BLANK..... Respondent

**RESPONDENT'S MOTION TO STRIKE  
PART OF APPELLANT'S DESIGNATION  
OF MATTER AND TO STAY THE FILING  
OF RESPONDENT'S INITIAL BRIEF AND  
DESIGNATION OF MATTER**

Respondent Michele Blank files this Motion to strike certain items included in Appellant's Designation of Matter to be included in the Record on Appeal and to Stay the filing of Respondent's Initial Brief and the Designation of Matter to be included in the Record on Appeal based upon the following circumstances.

Respondent filed a Complaint in Charleston County Magistrate Court against Appellant for severance pay in the amount of \$5000.00 plus the return of her personal property and other incidental damages. In defense of these claims, Appellant contended that he owed Respondent \$5000.00 not for severance but for her interest in a boat and demanded the return of his personal property. Appellant was pro se throughout the lower court proceedings and Frampton Durban, Jr. Esq. represented Respondent. A non-jury trial was held on November 21, 2013 before Charleston County Magistrate Guerard who reserved decision

pending each party's return of the personal property of the other. Following the exchange of the personal property, Magistrate Guerard entered Judgment dated February 21, 2014 against Appellant in the amount of \$5000. (plus costs). Following an appeal by Appellant, the Circuit Court affirmed but subsequently vacated its earlier order. In the interim, the Appellant filed an appeal to this Court, 2014-002751, to which Attorney Durban filed a Motion to Dismiss the Appeal. This Court issued a Remittitur returning the case to the Circuit Court by Order dated March 23, 2015 because of the lack of a final order.

Subsequently the Circuit Court remanded the matter to the Magistrate to explain the reason for the award and the Magistrate stated that it was for severance pay. The Circuit Court then issued a Final Order dated March 3, 2016 affirming the Magistrate's February 21, 2014 Judgment for severance pay. Appellant filed a Notice of Appeal pro se and an Initial Brief and a Designation of Matter and served Attorney Durban with them. By Letter dated June 16, 2016, the Clerk of the Court of Appeals directed Appellant to file his Final Brief and Record on Appeal because Respondent's Initial Brief had not been filed. Appellant served his Final Brief and Index to Principal Matters Included in Record on Appeal on July 5, 2015.

Respondent was unaware of the filing of the Notice of Appeal or that Attorney Durban was not responding to it and that he had not filed any Initial Brief or Designation of Matter to be included in the Record on Appeal. Respondent first learned about the pendency of this appeal by Letter dated July 19, 2016 from the Clerk of the Court of Appeals advising her to seek new counsel due to Attorney Durban's temporary suspension from the practice of law.

Respondent retained present counsel on July 25, 2016 who filed a motion on July 27<sup>th</sup> for Leave to File an Initial brief and Designation of Matter out of time and to stay the filing of the Appellant's Final Brief. By Order filed September 29<sup>th</sup>, this Court granted Respondent's

Motion and directed that Respondent's Initial Brief and Designation of Matter to be included in the Record on Appeal be filed in 30 days. Due to the effects of Hurricane Matthew, the Supreme Court has extended the time for filing under the South Carolina Appellate Court Rules by 10 days. Therefore, the time for filing Respondent's Initial Brief and Designation of Matter would be affected by that Order. Affidavit of Edward A. Bertele, Esq. at Para. 3.

Based upon his review of the Magistrate's Return and Supplemental Return to the appeal filed by Appellant and the Transcript of the hearing before the Magistrate on November 21, 2013 and the appeal before the Circuit Court on May 7, 2015, Respondent's Counsel determined that Appellant's Designation of Matter contained thirteen items that were not presented to the lower courts. These were designated as Item Nos. 1, 4, 7, 9, 10, 11, 12, 15, 23, 24, 39, 40, 42 in Appellant's Designation of Material. Affidavit of Edward A. Bertele, Esq. at Para. 4 & See Exhibit A (highlighted). By letter dated October 24, 2016 Counsel requested that Appellant delete those numbered items from the Designation of Matter which Appellant had previously filed because they had not been presented to the lower courts; or to advise him if Appellant disagreed. Id. at Exhibit B. Counsel advised Appellant of his intent to file a Motion to strike these items if the parties could not agree on the contents of the Designation. Id. Appellant responded only that he intended to be bound by the prior scheduling order. Id & Exhibit C. Accordingly, Respondent requests that her Motion be granted for the reasons set forth below.

#### **MEMORANDUM OF LAW**

S.C.A.C.R. 210 (c) states: "Content. The Record on Appeal shall include all matter designated to be included by any party under Rule 209 and shall comply with the requirements of Rule 267. **The Record shall not, however, include matter which was not**

**presented to the lower court or tribunal.”(Emphasis added).** Thirteen items contained in Appellant’s Designation of Matter to be included in the Record on Appeal are not included in the Return or Supplemental Return filed by the Magistrate Judge in connection with Appellant’s appeal to the Circuit Court. These are identified on Appellant’s Designation of Matter as No.1(Power of Attorney), 4 ( email response to employment offer), 7( Abbott Marine bank statement),9( Abbott Marine bank statement), 10 ( Robert Howe, Attorney), 11(email Lionel Lofton to Abbott Construction) ,12 ( Incident report Charleston County Sheriff’s Department), 15( Attorney Dottie Reed email correspondence) ,23( Small claims court complaint by Blank in NC) ,24(Notice of Appeal and subpoena NC Circuit Court) ,39 (correspondence with the North Carolina Wildlife Resources Commission),40( bill of sale Coconut Grove sailing club),42 ( boat title entered into evidence Jones County trial). Appellant did not respond to Counsel’s October 24<sup>th</sup> letter disputing that any of these were part of the Return or Supplemental Return or had otherwise been presented to the lower courts.

As this Court is aware, Magistrate Court proceedings are informal and each party is given ample opportunity to present their case. Appellant did not argue at any time in the proceedings below that Magistrate Guerard did not allow him to present any documents or make any statements that were part of his defense. Appellant did allege that the Circuit Court Judge refused to enforce a subpoena for documents which Appellant wanted for the hearing. Initial Brief at page 21. Appellant contended that he was not prepared for the testimony that came up at the Magistrate Court hearing and wanted to introduce the subpoenaed materials to support his appeal. Id. However, Appellant did not include that subpoena in the Designation of Matter. See Exhibit A.

Before this Court, Appellant is apparently trying to improve on his defense to the Magistrate Court judgment by including documents in the Record on Appeal which he could have introduced at the time of the trial below but failed to do so. Items No.1,4,7,9,11,12,15,39 & 40 all bear dates before the November 21, 2013 Magistrate Court trial. The remaining items, No. 10, 23, 24 & 42, bear dates after the Magistrate Court trial and have no relevance to the proceedings below. Therefore, all of the items to which Respondent has objected and which Appellant now wishes to include are not a proper part of the Record on Appeal under S.C.A.C.R. 210 (c).

Although the Appellant is pro se, he should be required to follow the South Carolina Appellate Court Rules just as any litigant represented by counsel, particularly S.C.A.C.R. 207 regarding the materials which are permitted in the Record on Appeal. By enforcing this rule, the Court and Respondent's Counsel will be better able to focus on the real issues before the Court, not what Appellant wants to argue which includes many, many extraneous issues clearly outside of the scope of this appeal. This will save judicial resources and Counsel's time as well.

Finally, the Court should recognize that the appeal is without merit because the Appellant has admitted before this Court that he owes Respondent the \$5000 awarded to Respondent by Magistrate Guerard, although he claims it is for a different reason than the Magistrate found. See Appellant's Initial Brief at page 28. Respondent believes that the Court needs to enforce its own Rules and to prevent an abuse of the appellate process which this Motion is intended to demonstrate.

## CONCLUSION

In order for this appeal to proceed in accordance with South Carolina Appellate Court Rules, specifically, S.C.A.C.R. 207, Respondent respectfully requests that the Court order the Appellant to delete the items identified above from his Designation of Matter to be included in the Record on Appeal.

Respectfully submitted,

By: 

Edward A. Bertele, Esq.

S.C. Bar No 72521

1812 Pierce Street

Charleston, SC 29492

843-471-2082

Attorney for Respondent, Michele Blank

Dated: October 27, 2016  
Charleston, SC

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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OCT 31 2016

APPEAL FROM CHARLESTON COUNTY  
Circuit Court Judge J.C. Nicholson, Jr.

SC Court of Appeals

JAMES ABBOTT..... Appellant

Vs.

MICHELE BLANK..... Respondent

**AFFIDAVIT OF EDWARD A. BERTELE  
IN SUPPORT OF MOTION TO STRIKE  
ITEMS CONTAINED IN APPELLANT'S  
DESIGNATION OF MATTER  
AND TO STAY FURTHER FILINGS**

County of Berkeley )

State of South Carolina )

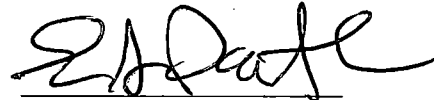
Edward A. Bertele, of full age being duly sworn according to law deposes and says:

1. I am an attorney at Law of the State of South Carolina and have personal knowledge of the facts set forth herein.
2. I respectfully request that this Court grant Respondent's Motion to strike a portion of Appellant's Designation of Matter to be included in the Record on Appeal and to stay the filing of Respondent's Initial Brief and Designation of Matter. This request is based upon the following facts.
3. I was retained by the Respondent to represent her in this matter on July 25, 2016 based upon her receipt of a July 19, 2016 letter from the Clerk of the Court of Appeals advising her that she should obtain new counsel because her attorney in the proceedings below, Frampton

Durban, Esq. had been suspended. I filed a Motion on July 27, 2016 for Leave to File an Initial Brief and Designation of Matter out of time and to stay the filing of the Appellant's Final Brief because Respondent's Initial Brief had not been filed. Appellant did not oppose that Motion. By Order filed September 29, 2016 this Court granted that Motion and directed that Respondent file her Initial Brief and Designation of Matter to be included in the Record on Appeal in 30 days. Since the date of that Order and due to the effects of Hurricane Matthew, the Supreme Court has extended the time for filing under the South Carolina Appellate Court Rules by 10 days. Therefore, I believe that the time for filing Respondent's Initial Brief and Designation of Matter would be affected by that Order.

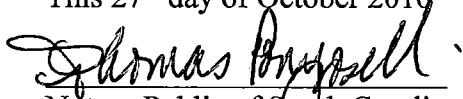
4. In the course of preparing Respondent's Initial Brief and Designation of Matter, I reviewed the Magistrate's Return and Supplemental Return to the appeal filed by Appellant in the Circuit Court. I also reviewed the Transcript of the trial before the Magistrate on November 21, 2013 and the hearing of the appeal before the Circuit Court on May 7, 2015 which Appellant included in his Designation of Matter and recently provided to me. I determined that Appellant's Designation of Matter contains thirteen items that were not presented to the lower courts. These were designated as Item Nos. 1, 4, 7, 9, 10, 11, 12, 15, 23, 24, 39, 40& 42. See Exhibit A (highlighted). By letter dated October 24, 2016 which was sent by email, I requested that Appellant delete those numbered items from the Designation of Matter which Appellant had previously filed because they had not been presented to the lower courts; or to advise me if Appellant disagreed. See Exhibit B. I advised Appellant of my intent to file a Motion to strike these items if we could not agree on the contents of the Designation. Id. Appellant responded by email only that he intended to be bound by the prior scheduling order. Exhibit C.

5. This Motion is not for the purposes of delay and will aid in narrowing the issues. Appellant has attempted to raise issues beyond the scope of this appeal in his Initial Brief and the Court should preclude those by ordering that the thirteen numbered items identified herein be stricken from his Designation of Matter.



Edward A. Bertele

Sworn and subscribed before me  
This 27<sup>th</sup> day of October 2016

  
Notary Public of South Carolina

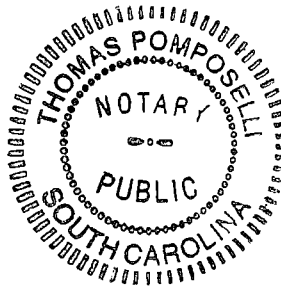


EXHIBIT A

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas

J.C. Nicholson, Jr., Circuit Court Judge

Case No. 2016-000712

Michele Blank

Respondent

v.

James R. Abbott

Appellant

APPELLANT'S DESIGNATION OF MATTER  
TO BE INCLUDED IN THE RECORD ON APPEAL

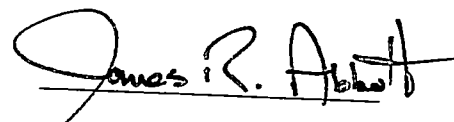
Appellant proposes the following to be included in the Record on Appeal:

1. Power of Attorney between Blank and Abbott January 30, 2012
2. Boat settlement sheet August 22, 2012
3. Contract offer to Blank January 10, 2013
4. Blank's email response to offer January 10, 2013
5. Check image-Abbott Marine Construction \$10,000 January 30, 2013
6. Email-Abbott to Blank expect \$2500 Feb 8, 2013 January 29, 2013
7. Bank statement-Abbott Marine Construction January 2013
8. Correspondence from BB&T Centralized Fraud Claims February 4, 2013
9. Bank Statement-Abbott Marine Construction February 2013
10. Robert G. Howe, Attorney April 20, 2016
11. Email-Lionel Lofton to Abbott Construction August 14, 2013
12. Incident Report Charleston County Sheriff's Department July 17, 2013
13. Small Claims Court complaint by Blank July 9, 2013
14. Abbott's response to complaint August 12, 2013
15. Attorney Dottie Fort Reed email Correspondence October 14, 2013
16. Pre-trial conference notification September 4, 2013
17. Correspondence Abbott to Guerard to drop jury trial November 14, 2013
18. Trial notification October 22, 2013
19. Transcript of Judgment Magistrate's Court February 21, 2014
20. Information enclosed with Transcript of Judgment February 21, 2014
21. SC Judicial Department Rule 19
22. Request for appeal to Circuit Court March 18, 2014

- |  |                    |
|--|--------------------|
| 23. Small Claims Court complaint by Blank in NC                  | July 31, 2014      |
| 24. Notice of Appeal and subpoena NC Circuit Court               | August 19, 2014    |
| 25. Appeal Summons Charleston County Circuit Court               | September 25, 2014 |
| 26. Transcript of Judgment 1 <sup>st</sup> Circuit Court Appeal  | November 26, 2014  |
| 27. Acceptance of 1 <sup>st</sup> appeal by State Court          | January 5, 2015    |
| 28. Answer to request for Transcript of Circuit Court Appeal     | February 12, 2015  |
| 29. Letter of Remittitur from State Court                        | April 8, 2015      |
| 30. Summons to 2 <sup>nd</sup> Circuit Court Appeal              | April 14, 2015     |
| 31. Transcript of 1 <sup>st</sup> Magistrate's Court trial       | November 21, 2013  |
| 32. Transcript of 2 <sup>nd</sup> Circuit Court Appeal           | May 7, 2015        |
| 33. Guerard's Return 1 <sup>st</sup> appeal to Circuit Court     | November 7, 2014   |
| 34. Summons to 2 <sup>nd</sup> Magistrate Court trial            | October 15, 2016   |
| 35. Guerard's Supplemental Return 2 <sup>nd</sup> trial          | Feb 3, 2016        |
| 36. Transcript of Judgment of Circuit Court                      | November 26, 2014  |
| 37. Definition of Power of Attorney                              |                    |
| 38. Definition of Fiduciary                                      |                    |
| 39. Correspondence from NC Wildlife Resources Commission         | February 28, 2013  |
| 40. Bill of Sale Coconut Grove Sailing Club                      | March 9, 2012      |
| 41. Boat title current   | August 5, 2013     |
| 42. Boat title entered into evidence Jones County trial          | August 2014        |
| 43. SC Code of Laws Section 15-36-10 Frivolous Civil Proceedings |                    |
| 44. SC Code of Laws Section 16-9-10 Perjury                      |                    |
| 45. SC Code of Laws Section 16-13-10 Forgery                     |                    |

The undersigned certifies that this designation contains no matter which is irrelevant to this appeal.

April 25, 2016



James R. Abbott  
Appellant *pro se*

EXHIBIT B

**EXHIBIT B**

**EDWARD A. BERTELE  
ATTORNEY AT LAW  
1812 PIERCE STREET  
CHARLESTON, SC 29492  
Email: [ebertele@msn.com](mailto:ebertele@msn.com)**

Member: SC, NJ & NY bars

Ph: (843) 471-2082  
Fax: (843) 471-2082

October 24, 2016

**VIA EMAIL**

Mr. James R. Abbott  
241 Paul Drive  
Trenton, NC 28585

**Re: Abbott v. Blank, 2014 CP-10-1829  
Court of Appeals Case No. 2016-000712**

Dear Mr. Abbott:

I have reviewed the Magistrate's Return and Supplemental Return which were filed in response to your Appeal to the Circuit Court. These contain 72 and 75 pages respectively. You can confirm this on the Charleston County Clerk of Court website under the Circuit Court section where the Orders and pleadings are contained online. Your Designation of Matter to be included in the Record on Appeal contains many items which do not appear in the Magistrate's Return or Supplemental Return and should not be part of the Record on Appeal. I refer you to South Carolina Appellate Court Rule 210 (c) which states: "Content. The Record on Appeal shall include all matter designated to be included by any party under Rule 209 and shall comply with the requirements of Rule 267. **The Record shall not, however, include matter which was not presented to the lower court or tribunal.**"

I believe that the following items in your Designation of Matter were not presented to the Magistrate at the November 21, 2103 hearing and are not to be included in the Record on Appeal: Nos. 1,4,7,9,10,11,12,15,23,24,39,40,42. Please advise me promptly if you disagree that these were not included in the Magistrate's Return or Supplemental Return. Also I do not understand your description of Item No. 20, "Information enclosed with Transcript of Judgment". Could you please describe it further?

You have also included other items which are not appropriate for inclusion in the Record on Appeal, Nos. 21,37,38,43-45, which are legal citations that you can include in your Brief if you choose to do so.

If we cannot agree on the items to be included in the Designation of Matter, I will be filing a Motion to have them stricken so as not to appear in the Record on Appeal for the reasons I mentioned above. Please advise me at your earliest convenience.

Cordially,

Edward A. Bertele

CC: Michele Blank

EXHIBIT C

**edward**

---

**From:** "account update" <abbottconstruction@tds.net>  
**To:** "edward" <ebertele@msn.com>  
**Sent:** Wednesday, October 26, 2016 10:29 AM  
**Attach:** SC Court Order Sep 29.pdf; Bertele Oct 26.pdf  
**Subject:** Re: Abbott v Blank appeal

I intend to follow the court order.

James R. Abbott  
Appellant pro se

---

**From:** "edward" <ebertele@msn.com>  
**To:** abbottconstruction@tds.net  
**Sent:** Tuesday, October 25, 2016 8:02:24 AM  
**Subject:** Abbott v Blank appeal

Hi Mr. Abbott: please see my letter attached concerning the Designation of Matter and let me know what you intend to do. Cordially, Ed Bertele

Edward A. Bertele  
Attorney at Law  
1812 Pierce Street  
Charleston, SC 29492  
(843) 471-2082

10/27/2016

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM CHARLESTON COUNTY  
Circuit Court Judge J.C. Nicholson, Jr.

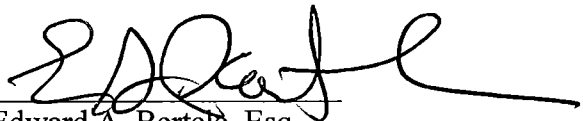
JAMES ABBOTT..... Appellant

Vs.

MICHELE BLANK..... Respondent

**CERTIFICATION OF SERVICE**

I hereby certify that a true copy of the Respondent's Motion to Strike a portion of Appellant's Designation of Matter and to stay the filing of Respondent's Initial Brief and the Record on Designation of Matter to be included in the Record on Appeal and the Affidavit of Edward A. Bertele, Esq. was served upon the Appellant, James Abbott by regular mail postage prepaid at his last known mailing address.

  
Edward A. Bertele, Esq.

October 27, 2016

**EDWARD A. BERTELE  
ATTORNEY AT LAW  
1812 PIERCE STREET  
CHARLESTON, SC 29492  
Email: [ebertele@msn.com](mailto:ebertele@msn.com)**

Member: SC, NJ & NY bars

Ph: (843) 471-2082

Fax: (843) 471-2082

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October 27, 2016

OCT 31 2016

**SC Court of Appeals**

Ms. Jenny Abbott Kitchings, Clerk  
South Carolina Court of Appeals  
1220 Senate St.  
PO Box 11629  
Columbia, SC 29211

**Re: Abbott v. Blank  
Case No. 2016-000712**

Dear Ms. Kitchings:

I represent the Respondent in this case, Michele Blank. Enclosed for filing are the original and six copies of Respondent's Motion to Strike a portion of Appellant's Designation of Matter to be included in the Record on Appeal and Affidavit of Edward A. Bertele, Esq. in support. Also included is an original Certification of Service and the Motion fee (\$25.00). Thank you for your attention to this matter.

Very truly yours



Edward A. Bertele

CC: James Abbott, pro se  
Encl:

★ **MA**

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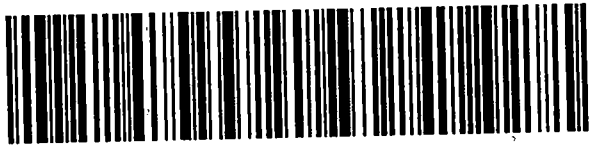
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